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No. 04-1131

IN THE

Supreme Court of the United States

TERRY L. WHITMAN,
Petitioner,

v.

U.S. DEPARTMENT OF TRANSPORTATION, *ET AL.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AND NATIONAL FEDERATION OF FEDERAL EMPLOYEES, AS *AMICI CURIAE* SUPPORTING PETITIONER

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STATEMENT OF INTEREST[1]

The American Federation of Government Employees ("AFGE"), an affiliate of the AFL-CIO, is a labor union that represents approximately 600,000 civilian employees of nearly every major department and agency of the federal government, as well as the government of the District of Columbia.

The National Federation of Federal Employees ("NFFE"), an affiliate of the International Association of Machinists and Aerospace Workers, is a labor union that represents approximately 65,000 civilian employees of major departments and agencies of the federal government, including the General Services Administration; Veterans Administration; and Departments of Agriculture, Interior, Defense, and Homeland Security.

Amici were heavily involved in the original enactment and subsequent amendment of the Civil Service Reform Act ("CSRA"), 5 U.S.C. § 1101 *et seq.*, and thus have an institutional interest in decisions interpreting the CSRA. Amici believe that CSRA-covered federal employees deserve the same, basic protection available to private citizens: the right to seek equitable redress in federal court for violations of their federal constitutional and statutory rights.

In addition, as emerging civil service reforms reduce the administrative and judicial remedies available to many federal public servants, Amici's members depend on judicial

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[1] Letters from Petitioner and Respondent indicating consent to file this brief are on file with the Clerk. Pursuant to Rule 37.6, Amici state that no counsel for any petitioner or respondent authored this brief in whole or in part. Nor did any person or entity, other than Amici, make a monetary contribution to the preparation or submission of this brief.

review as a last resort to protect their basic constitutional rights.

Finally, Amici recognize that the nation continues to depend on federal civil servants to deliver essential services and safeguard homeland security. As large percentages of civil servants approach retirement, the government will "increasingly engage in a 'war for talent' with both businesses and nonprofits." Partnership for Public Service, *The Class of 9/11* 7 (2005).[2] Restricting civil servants' ability to vindicate their constitutional rights in court "would undoubtedly lead to new difficulties and expense in recruiting [qualified civil servants] for the programs Congress has established." *Schweiker v. Chilicky*, 487 U.S. 412, 425 (1988).

STATEMENT OF THE CASE

Petitioner Terry L. Whitman has worked for twenty years as an Air Traffic Assistant with the Federal Aviation Administration ("FAA"). (Pet. App. 2a.) Congress has authorized the FAA to subject certain employees to "reasonable suspicion, random, and post-accident" testing for drugs and alcohol. 49 U.S.C. § 45102(a)(1). The FAA must "ensure that employees are selected for tests by nondiscriminatory and impartial methods, so that no employee is harassed by being treated differently from other employees in similar circumstances." 49 U.S.C. § 45104(8). The drug tests must also comply with the Fourth Amendment. *NTEU v. Von Raab*, 489 U.S. 656, 665 (1989).

[2] *See also* Center for Organizational Research, *The Aging-and-Retiring Governmen: Workforce* 2 (2003).

Whitman recognizes the FAA's authority to conduct drug tests, but seeks to enjoin the FAA from administering its drug testing program in a nonrandom and suspicionless manner. (J.A. 6-7.) Whitman has been drug tested eleven times, and significantly more frequently than his colleagues, despite never having tested positive. (J.A. 6-11, 13-19.) Whitman also contends that the FAA has subjected him to additional tests as retaliation against him for complaining about the FAA's misapplication of the testing program. (J.A. 13, 14-19.)

Whitman initially filed a complaint with the Federal Labor Relations Authority ("FLRA"). (Pet. App. 3a.) The FLRA determined that it lacked jurisdiction over his complaint, and subsequently denied Whitman's request for reconsideration. (*Id.*) The FLRA also told Whitman that his "recourse is through the grievance procedures of the negotiated agreement." (*Id.*)

Whitman's grievance procedures are provided by the collective bargaining agreement ("CBA") negotiated between the FAA and Whitman's union. (J.A. 20-28.) Prior to 1994, the CSRA described the CBA's negotiated grievance procedures as "the exclusive procedures for resolving grievances." *See* Pub. L. No. 95-454, Title VII, § 701, 92 Stat. 1111 (1978). Some courts, including the Federal Circuit, interpreted this language to prohibit judicial review of such grievances, even after the employee had exhausted his CBA procedures. *See, e.g., Carter v. Gibbs*, 909 F.2d 1452, 1457-58 (Fed. Cir. 1990) (en banc).[3]

In 1994, Congress amended the CSRA to provide that CBA grievance procedures are "the exclusive *administrative*

[3] *See also, e.g., O'Connell v. Hove*, 22 F.3d 463, 466 (2d Cir. 1994); *Veit v. Heckler*, 746 F.2d 508, 511 (9th Cir. 1984).

procedures for resolving grievances which fall within its coverage." 5 U.S.C. § 7121(a)(1), Pub. L. No. 103-424, § 9, 108 Stat. 4365 (1994) (emphasis added).

After the FLRA dismissed his complaint, Whitman filed suit in federal district court. Whitman alleged that the FAA's targeted, suspicionless testing violated both the drug testing statute and the Constitution. (*See* J.A. 6-19.) The district court dismissed Whitman's complaint for lack of subject matter jurisdiction. (Pet. App. 14a.) The Ninth Circuit affirmed, holding that the CSRA "as amended in 1994, does not expressly confer federal court jurisdiction over employment-related claims covered by the negotiated grievance procedures of federal employees' collective bargaining agreements." (Pet. App. 2a.)

The Ninth Circuit's decision leaves Whitman with no opportunity for judicial review of his statutory or constitutional claims. In addition to the CBA grievance procedures, FAA employees have available the following administrative options, none of which lead to judicial review:

Merit Systems Protection Board: An employee who has suffered a "major adverse personnel action" can seek review from the Merit Systems Protection Board ("MSPB"). *See* 49 U.S.C. §§ 40122(g)(3), (h). A "'major adverse personnel action' means a suspension of more than 14 days, a reduction in pay or grade, a removal for conduct or performance, a nondisciplinary removal, a furlough of 30 days or less ...,or a reduction in force action." *Id.* § 40122(j). Parties dissatisfied with the MPSB's resolution may appeal to the Federal Circuit. *See* 5 U.S.C. § 7703.

Whitman has not suffered a "major adverse personnel action," and therefore cannot invoke the MSPB's jurisdiction. Were Whitman not covered by the CBA, he would be eligible to petition the Guaranteed Fair Treatment

Program ("GFTB"), an FAA-specific arbitration procedure which culminates in judicial review. Like the MSPB, however, the GFTB is limited to employees who have suffered a "major adverse personnel action." *See* 49 U.S.C. § 40122(h).

Federal Labor Relations Authority: The FLRA hears employee claims of "unfair labor practices" against either the agency employer, or employee's union. *See* 5 U.S.C § 7116(a). Unfair labor practices generally involve violations of employees' rights with respect to labor organizing, union representation, and collective bargaining, as provided by the Federal Service Labor Management Relations Statute. *See* 5 U.S.C. §7116. An employee challenging an "unfair labor practice" initiates the process by lodging a charge with an FLRA regional office. If the office decides to issue a complaint, an administrative law judge will hear the complaint and issue a final administrative order. *See* 5 U.S.C. § 7118; 5 C.F.R. 2423.41. The employee may seek judicial review of that order. *See* 5 U.S.C. § 7123(a).

Whitman's FLRA regional office found that it lacked jurisdiction over Whitman's claims, and thus declined to issue a complaint. (Pet. App. 3a.) An employee may not seek judicial review of a regional office's refusal to issue a complaint. *See, e.g., Turgeon v. FLRA*, 677 F.2d 937, 939 (D.C. Cir. 1982) (per curium).

Office of Special Counsel: An employee subject to a "prohibited personnel practice" may petition the Office of Special Counsel ("OSC"). *See* 5 U.S.C. § 1211. The OSC reviews complaints regarding violations of twelve prohibited personnel practices delineated in 5 U.S.C. § 2302(b). Among the twelve prohibited practices is the violation of "any law, rule, or regulation implementing, or directly concerning, the [statutory] merit system principles." *Id.* § 2302(b)(12). The "merit system principles" require agencies to treat their

employees "with proper regard for their privacy and constitutional rights." *Id.* § 2301(b)(2).

However, under the FAA Personnel Management System, only employees asserting whistleblower claims, as defined by 5 U.S.C. § 2302(b)(8), can petition the OSC. *See* 49 U.S.C. § 40122(g)(2)(A). Whitman is not and does not purport to be a whistleblower. Even if Whitman were subject to the omnibus CSRA procedures, his claims would not be subject to judicial review. Non-whistleblower claims can be brought to the MSPB and eventually to the Federal Circuit *only* if the OSC first finds "reasonable grounds to believe that the personnel action was taken, or is to be taken, as a result of a prohibited personnel practice." *See* 5 U.S.C. § 1214(b)(1). If the OSC does not find such "reasonable grounds," the employee receives no additional administrative or judicial review.

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As a result of the Ninth Circuit's decision, then, Whitman could not receive judicial review of even his constitutional claims unless he refused to submit to a drug test and suffered a termination or other "major adverse employment action."

SUMMARY OF ARGUMENT

The Court has traditionally interpreted federal civil service statutes to provide Government agencies with necessary flexibility, while also ensuring that the federal courts are open as a last resort for civil servants seeking to enjoin unconstitutional employment actions. The Ninth Circuit's decision upsets Congress's careful balance by holding that CSRA, as amended, affords civil servants no judicial review, even for constitutionally-based claims seeking equitable relief. The Court has never imputed such a

radical departure from the settled presumption of constitutional review.

For decades Congress has legislated under the presumption that federal judicial review is available to provide equitable relief to those aggrieved by agency action, especially unconstitutional agency action. Nothing in the amended CSRA's text, structure, or legislative history suggests that Congress sought either to overcome this strong presumption, or to single out federal employees as a class of people without access to judicial redress. To the contrary, the 1994 amendments to the CSRA illustrate that when courts have interpreted the CSRA to foreclose judicial review, Congress has responded swiftly to remedy this unfair result.

The Ninth Circuit's nullification of Congress's intent to restore judicial review to public servants' constitutional and statutory claims has disturbing implications. Recent and proposed legislation will, for an increasing number of civil servants, eliminate the CSRA's remedial protections. For these employees, the availability of judicial review of independent constitutional and statutory rights is more vital than ever.

ARGUMENT

I. THE NINTH CIRCUIT UPSET A DELICATE BALANCE BETWEEN GOVERNMENT EMPLOYERS' FLEXIBILITY AND THE CONSTITUTIONAL AND STATUTORY RIGHTS OF PUBLIC SERVANTS.

Rather than recognizing the historic balance between the interests of Government agencies and those of their employees, the Ninth Circuit's reading of the CSRA shifts the pendulum far in one direction. The Ninth Circuit's

construction of the CSRA would leave courts powerless to enjoin even the most flagrant violations of federal civil servants' constitutional rights that fall short of major adverse actions. Under this interpretation, state prisoners, high school students, and convicted sex offenders would potentially have more access to judicial relief than would federal public servants.[4] In sum, the decision below would resurrect the long-discredited "dogma . . . that a public employee ha[s] no right to object to conditions placed upon the terms of employment—including those which restricted the exercise of constitutional rights." *Connick v. Myers*, 461 U.S. 138, 143 (1983).

A. The Ninth Circuit's Decision Leaves Many Federal Employees Without an Effective Remedy For Unconstitutional Government Conduct.

"Constitutional questions obviously are unsuited to resolution in administrative hearing procedures and, therefore, access to the courts is *essential* to the decision of such questions." *Califano v. Sanders*, 430 U.S. 99, 109 (1977) (emphasis added). Yet the Ninth Circuit's reading of the CSRA assumes that Congress intended to strip federal civil servants of this "essential" protection, leaving them without even the most basic protection of their constitutional rights.

1. The CSRA's administrative remedies are no substitute for judicial review.

[4] *See, e.g., Cutter v. Wilkinson*, 125 S.Ct. 2113, 2116 (2005) (permitting prisoners to challenge restrictions on religious practice); *Smith v. Doe*, 538 U.S. 84, 89 (2003) (considering and rejecting challenge by convicted sex offender seeking to enjoin requirement that he register with the state); *Bd. of Educ. v. Earls*, 536 U.S. 822, 825 (2002) (considering and rejecting high school student's Fourth Amendment challenge to administration of drug tests).

The Ninth Circuit's decision leaves CSRA-covered employees without meaningful protections against certain conduct that is illegal or even unconstitutional. *First*, the Ninth Circuit decision invites employees such as Whitman to forfeit the opportunity to bring a pre-enforcement challenge to illegal restrictions. If an agency supervisor reprimanded any employee who prayed at a given mosque, church, or synagogue, who joined a particular organization, or who voted for a particular political candidate, that employee would not suffer the "major adverse personnel action" necessary for judicial review until after she engaged in the constitutionally protected conduct and was terminated. Few employees would be willing or able to jeopardize employment for an opportunity to assert their constitutional rights in court. Conditioning judicial review on losing one's job, or other serious consequences, would be "tantamount to a complete denial of judicial review." *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496-97 (1991) (recognizing that absent availability of pre-enforcement challenge to constitutionality of INS administration of agricultural worker program, aliens seeking to contest INS practice could ensure judicial review "only if they voluntarily surrender themselves for deportation").

The Court has repeatedly recognized that "[o]ne does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough." *Pac. Gas & Elec. Co. v. State Energy Conservation & Dev. Comm'n*, 461 U.S. 190, 200 (1983) (quotations omitted).[5] Thus, in *Virginia v. American*

[5] *See also, e.g., Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990) (when an agency promulgates "a substantive rule which as a practical matter requires the plaintiff to adjust his conduct immediately[,] [s]uch agency action is 'ripe' for review at once"); *Abbott Labs. v. Gardner*, 387 U.S. 136, 153 (1967) (pre-enforcement challenge appropriate "where a regulation requires an immediate and significant

Booksellers Ass'n, 484 U.S. 383 (1988), the Court permitted a pre-enforcement First Amendment challenge to a Virginia law restricting the displays of booksellers. The Court held that "the alleged danger of this statute is, in large measure, one of self-censorship; a harm that can be realized even without actual prosecution." *Id.* at 393.

Second, the Ninth Circuit's ruling will in many cases wrest judicial review from even those civil servants courageous enough to exercise their constitutional rights. A federal employee can obtain judicial review from the Federal Circuit of "major adverse personnel actions," which are limited to suspension of greater than two weeks; a pay cut or demotion; a furlough of 30 days or less; or termination. *See* 49 U.S.C. 40122(g)(3), (h). But a civil servant who receives "reprimand letters, . . . [a] two-week suspension without pay, denial of training and advancement opportunities, and negative evaluations," *see, e.g., Adler v. Glickman*, 87 F.3d 956, 958 (7th Cir. 1996), may not seek equitable relief from a federal court—even if the punishment was motivated by blatantly unconstitutional considerations.

Without judicial review, most civil servants would have only two means of enforcing their constitutional rights. Both are inadequate. An employee could ask his union to pursue arbitration on his behalf. But the Court has never held that binding arbitration is an appropriate way to dispose of an employee's constitutional claims. In other contexts, the Court has signaled that the adjudication of "constitutional issues is a primary responsibility of the courts." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57 (1974).

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change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance").

In any event, the union can refuse to pursue arbitration, and an employee cannot appeal the union's decision. Even if the union were to pursue the employee's claim, "[t]he union's interests and those of the individual employee are not always identical or even compatible," *McDonald v. City of West Branch*, 466 U.S. 284, 291 (1984). The union may be constrained by limited resources, or the need to consider the interests of its entire membership. As a result, "the union may present the employee's grievance less vigorously, or make different strategic choices, than would the employee." *Id.* Without judicial review, "an employee's opportunity to [redress] a constitutional deprivation might be lost merely because it was not in the union's interest to press his claim vigorously." *Id.*

Alternatively, the employee could pursue administrative remedies by filing a complaint with the Office of Special Counsel. FAA employees such as Whitman, however, can only do so if their claim involves whistleblowing. *See* 49 U.S.C. § 40122(g)(2)(A).

Even for employees covered by the more expansive CSRA provision, the OSC remedy is insufficient on its own. As AFGE officials have testified before Congress, the OSC "has remained a source of great frustration and little refuge for federal workers complaining of prohibited personnel practices," and "has failed to act in a timely and effective manner in too many of the situations brought before it, to the detriment of those the office is charged with helping."[6] As Justice Brandeis recognized nearly 70 years ago,

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[6] *See To Reauthorize the Office of Special and to Make Amendments to the Whistleblower Protection Act: Hearing on H.R. 2970 before the Subcomm. on the Civil Serv. of the Comm. on Post Office and Civil Serv.*, 103d Cong. 17-19 (1993).

> [t]he supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous law was applied . . . the person asserting a right, whatever its source, should be entitled to the independent judgment of a court on the ultimate question of constitutionality.

St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 84 (1936) (Brandeis, J., concurring).

2. Non-CSRA employees may lack any forum, judicial or administrative, to redress violations of statutory or constitutional rights.

The Ninth Circuit's decision will particularly destabilize the rights of those federal employees who lack even the administrative remedies provided by the CSRA. Upon establishing the Department of Homeland Security, "Congress gave [the Department] extraordinary authority to develop a separate human resources management system [] for DHS without regard to many of the constraints imposed by the civil service laws that normally govern employees in the competitive service of the federal government." *Nat'l Treasury Employees Union v. Chertoff*, --- F. Supp. 2d. ---, 2005 WL 1941398, at *1 (D.D.C. Aug. 12, 2005). Homeland Security's new personnel system "is expected to dramatically change the way many of the department's 180,000 workers are paid, promoted, deployed, and disciplined. A similar system being developed at the Defense Department would affect 746,000 workers . . . ." Christopher Lee, *Unions Seek to Meet Chertoff on DHS Plan*, Wash. Post., Aug. 16, 2005, at A11.

Given the abolition of many checks on the Government's treatment of federal employees, judicial

review is becoming even more essential to preventing the federal workplace from devolving into a "rights-free" zone.

B. Unlike the Ninth Circuit's Decision, the Court's Precedents Preserve Agency-Employers' Flexibility While Still Enforcing Civil Servants' Constitutional Rights.

The Court has traditionally recognized the need to balance the protection of civil servants' constitutional rights with "the interest of the [Government], as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968). But the Court has struck such a balance without denying public servants, including federal public servants, the right to vindicate in court their fundamental constitutional rights.

The Court strikes this balance in several ways. *First*, the Court recognizes that although government employees do not forfeit their constitutional rights in the workplace, Government interests may affect the scope of a civil servant's constitutional rights. Thus, in *Connick*, the Court held that government employees may be disciplined based on speech unrelated to matters of public concern, but reiterated that the First Amendment protects such employees' workplace speech about issues of public concern. 461 U.S. at 147. Likewise, in *Von Raab*, the Court upheld the Government's right to administer drug tests to employees responsible for interdicting illegal drugs, but reaffirmed the general principle that the Fourth Amendment constrains the Government's searches of its employees. 489 U.S. at 672.

Even "the unique disciplinary structure of the military establishment," *Chappell v. Wallace*, 462 U.S. 296, 304 (1983), which mandates judicial review "far more deferential than constitutional review of similar laws or regulations

designed for civilian society," *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986), does not bar military personnel "from all redress in civilian courts for constitutional wrongs suffered in the course of military service," *Wallace*, 462 U.S. at 304. Rather, military personnel may seek equitable relief "designed to halt or prevent the constitutional violation." *United States v. Stanley*, 483 U.S. 669, 683 (1987).

Second, the Court has recognized Congress's ability to require the channeling of legal claims through administrative processes prior to judicial review. Such channeling through an agency process "assures the agency greater opportunity to apply, interpret, or revise policies, regulations, or statutes without possibly premature interference by different individual courts." *Shalala v. Ill. Council on Long Term Care*, 529 U.S. 1, 13 (2000).[7]

But the courts have also concluded that Congress intended such administrative avenues to complement, not supplant, judicial review. In *Steadman v. Governor, United States Soldiers' and Airmen's Home*, 918 F.2d 963 (D.C. Cir. 1990), the District of Columbia Circuit recognized that by enacting the CSRA "Congress passed an enormously complicated and subtle scheme to govern employee relations in the federal sector," which "federal employees may not circumvent . . . even if their claim is based as well on the Constitution." *Id.* at 967. At the same time, the court stressed that if the administrative process fails to vindicate a federal employee's constitutional rights, "the federal courts are open." *Id.* at 968.

Third, although the Court acknowledges that civil litigation must sometimes adapt to the unique functions of certain government agencies, the Court has nonetheless

[7] *See also, e.g., Heckler v. Ringer*, 466 U.S. 602 (1984); *Weinberger v. Salfi*, 422 U.S. 749 (1975).

concluded that Congress did not intend to exempt even the most top-secret of federal agencies from answering to judicial process. For example, the Court has prohibited former covert agents from bringing constitutional claims against the CIA where the suit would require disclosure of "the existence of [the plaintiffs'] secret espionage relationship with the Government." *Tenet v. Doe*, 125 S. Ct. 1230, 1236 (2005).

But, the Court has refused to hold that "all [CIA] employment termination decisions, even those based on policies normally repugnant to the Constitution, are given over to the absolute direction of the Director." *Webster v. Doe*, 486 U.S. 592, 603 (1988). The Court determined that Congress preserved CIA employees' opportunity for court-ordered constitutional redress even though the CIA "is an agency thought by every President since Franklin D. Roosevelt to be essential to the security of the United States and—in a sense—the free world." *Snepp v. United States*, 444 U.S. 507, 512 n.7 (1980).

II. THE NINTH CIRCUIT OVERLOOKED THE FIRM PRESUMPTION THAT COURTS MAY ENJOIN CONSTITUTIONAL VIOLATIONS, AND UNDERMINED A KEY FOUNDATION OF COLLECTIVE BARGAINING.

The Court maintains "the strong presumption that Congress intends judicial review." *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 424 (1995) (citation omitted). As a result of this presumption, the Court requires "clear and convincing evidence of any congressional intent to preclude" judicial review of agency action. *Traynor v. Turnage*, 485 U.S. 535, 543 (1988). The presumption in favor of judicial review is even stronger when constitutional claims are at stake, given the "serious constitutional question" that would arise if a statute withheld any and all judicial review of

constitutional claims. *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 681 n.12 (1986).

The Ninth Circuit neither mentioned nor applied these principals in holding that the CSRA precludes equitable judicial relief for continuing violations of an individual's constitutional rights. Instead, the Ninth Circuit incorrectly applied the Court's *Bivens* line of cases, which establish a standard for judicial creation of constitutional damages remedies, but presuppose access to equitable relief. Further, the Ninth Circuit's novel approach upset not only decades of Supreme Court precedent, but also a key assumption underlying collective bargaining between civil servants and the Government.

A. Absent a Clear Statement to The Contrary, the CSRA Preserves Judicial Review of Constitutional Claims.

The Ninth Circuit held that the CSRA "does not constitute an express grant of federal court jurisdiction over [statutory and constitutional] claims." (Pet. App. 10a.) The grant need not come from the CSRA. 28 U.S.C. § 1331 provides federal courts subject matter jurisdiction to review agency action. *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 56 (1993). Plaintiffs implicitly possess a cause of action to enforce their own constitutional rights. *Davis v. Passman*, 442 U.S. 228, 242-44 (1979). And the Administrative Procedure Act waives sovereign immunity for suits seeking equitable relief against an agency or its officials. 5 U.S.C. § 702.

Nor did the CSRA strip the courts of their preexisting authority to enjoin the Government from violating a citizen's constitutional rights. Time and time again, the Court has refused to interpret federal statutes to prohibit courts from enjoining unconstitutional agency action, even when

presented with court-stripping language far clearer than it is here. The necessary clear statement was missing from language providing that "the decisions of the Administrator on *any* question of law or fact under any law administered by the Veterans Administration providing benefits . . . shall be final and conclusive and no . . . court of the United States shall have power or jurisdiction to review any such decision." *Johnson v. Robison*, 415 U.S. 361, 367 (1974) (emphasis added). Also insufficiently clear was a statutory command that "[n]o court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien." *Demore v. Kim*, 538 U.S. 510, 516 (2003).

Even when the rights of federal employees are at stake, and even in the most sensitive and secretive of agencies, the Court has interpreted the statute at issue to preserve judicial review of constitutional claims. In *Webster*, a terminated CIA employee contended that his firing violated due process and equal protection, and sought an injunction reinstating him. 486 U.S. at 601-02. The National Security Act provided that the CIA Director "may, in his discretion, terminate the employment of any [Agency employee] whenever he shall deem such termination necessary." *Id.* at 594. The Court agreed, given the Act's language and the sensitive nature of the CIA's mission, that the APA prohibited judicial review of the Director's decision. *Id.* at 601.

Nevertheless, the Court refused to interpret the Act as depriving the employee of the right to seek judicial review of his constitutional claims. Notwithstanding that the Act manifested intent to preclude judicial review of personnel decisions, the Court reiterated that "where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear." *Id.* at 603. The Court reaffirmed that it "require[s] this heightened showing in part to avoid the

serious constitutional question that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Id.* (citation omitted).

The Court has *never* interpreted a statute to prohibit *all* judicial review of a constitutional claim brought against a federal agency. Without a clear statement precluding such review, the CSRA is a poor candidate to be the first.

B. The Ninth Circuit Confused the Narrow Grounds for Inferring a Monetary Remedy with the Broad Grounds for Inferring an Equitable Remedy.

The Ninth Circuit's decision stems from a fundamental misapplication of the Court's *Bivens* jurisprudence. In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, the Court held that even absent specific congressional authorization, a plaintiff could sue federal narcotics agents for monetary damages resulting from a search and seizure that violated the Fourth Amendment. 403 U.S. 388, 397 (1971).[8] However, in *Bush v. Lucas*, 462 U.S. 367 (1983), the Court refused to infer a *Bivens* remedy for constitutional violations affecting federal employees covered by the CSRA. The Court held that the CSRA's "elaborate, comprehensive [administrative] scheme" counseled against creating "a new judicial remedy" that would allow a civil servant to seek monetary damages from a federal official who had allegedly violated his First Amendment rights. *Id.* at 385, 388.

[8] The Court has subsequently extended *Bivens* damages relief to actions for violations of both the Fifth Amendment Due Process Clause, *see Davis v. Passman*, 442 U.S. 228 (1979), and the Eighth Amendment's prohibition against cruel and unusual punishment, *see Carlson v. Green*, 446 U.S. 14 (1980).

The Ninth Circuit's decision is based upon a prior Ninth Circuit holding that under *Bush* and its progeny, "[t]he CSRA [also] precludes [a plaintiff] from seeking injunctive relief for his asserted constitutional injury...." *Saul v. United States*, 928 F.2d 829, 843 (9th Cir. 1991). But *Bush*, like the entire *Bivens* line of cases, did not purport to create or restrict equitable relief. Rather, the Court asked "[w]hen a federal civil servant is the victim of a retaliatory demotion or discharge because he has exercised his First Amendment rights, what *legal* remedies are available to him?" *Bush*, 462 U.S. at 381 (emphasis added).

As other Courts of Appeals recognize, the Ninth Circuit's extension of *Bivens* analysis to suits seeking wholly injunctive relief is unsupported by the logic of *Bivens* itself. *Hubbard v. EPA*, 809 F.2d 1, 11 (D.C. Cir. 1986) (stating that "*Bush* only precludes damage claims against individuals, not equitable claims against agencies"); *Mitchum v. Hurt*, 73 F.3d 30, 35 (3d Cir. 1995) ("Just because 'special factors counseling hesitation' militate against the creation of a new non-statutory damages remedy, it does not necessarily follow that the long-recognized availability of injunctive relief should be restricted as well."); *Spagnola v. Mathis*, 859 F.2d 223, 226 (D.C. Cir. 1988) (noting that the Court's decision in *Bush* held that the CSRA's comprehensive statutory scheme constitutes a "special factor counseling hesitation against *creating* a [new] *Bivens* remedy") (emphasis added and internal citation omitted).

First, unlike in the *Bivens* context, the Court need not break new ground to recognize the right to seek injunctive relief to remedy constitutional violations. *Bivens* "recognized for the first time" an implied cause of action for money damages to remedy a constitutional violation. *Corr.*

Servs. Corp. v. Malesko, 534 U.S. 61, 66 (2001).[9] Decisions such as *Bush* limiting *Bivens* remedies reflect the Court's unwillingness to adopt "suggestions that *Bivens* remedies be *extended into new contexts*." *Schweiker*, 487 U.S. at 421 (emphasis added). By contrast, even twenty-five years before *Bivens* was decided, it had long been "established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution." *Bell v. Hood*, 327 U.S. 678, 684 (1946) (footnote omitted).

Second, the Court's concerns about financial liability in the damages context are inapposite to actions for injunctive relief. The *Bivens* remedy contemplated both compensatory and punitive damages, *see Carlson v. Green*, 446 U.S. 14, 21-22 (1980), which could "creat[e] a potentially enormous financial burden for the Federal Government," *FDIC v. Meyer*, 510 U.S. 417, 486 (1994). In the CSRA context, the Court cautioned that "if management personnel face the added risk of personal liability for decisions that they believe to be a correct response to improper criticism of the agency, they would be deterred from imposing discipline in future cases." *Bush*, 462 U.S. at 389. Moreover, equitable relief imposes no personal financial liability on agency officials. It simply requires them to stop violating the Constitution.

[9] *See also Malesko*, 534 U.S. at 66 (discussing the Court's "authority to imply a *new* constitutional tort") (emphasis added); *Schweiker*, 487 U.S. at 422 (discussing previous question whether "to *create* a *Bivens* action for enlisted military personnel") (emphasis added); *Bush*, 462 U.S. at 389 (discussing "the impact of a *new species* of litigation between federal employees") (emphasis added); *Carlson*, 446 U.S. at 18 ("*Bivens established* that the victims of a constitutional violation by a federal agent have a right to recover damages.") (emphasis added).

Third, Congress itself views suits for monetary damages as far more intrusive than suits for injunctive relief. In *Lane v. Pena*, 518 U.S. 187, 192-93 (1996), the Court held that Congress had not waived the Government's sovereign immunity from a money damages suit brought by a cadet who was illegally expelled from the Merchant Marine Academy. Nevertheless, because Congress had not precluded the plaintiff from seeking injunctive relief, the Court upheld a lower court judgment ordering the cadet reinstated. Likewise, the APA waives the Government's sovereign immunity against suits in federal court, but does so only for suits "seeking relief other than money damages." 5 U.S.C. § 702.[10]

Finally, the Court has generally refused to infer *Bivens* damages remedies only when injunctive relief remains available. "[U]nlike the *Bivens* remedy, which [the Court has] never considered a proper vehicle for altering an entity's policy, injunctive relief has long been recognized as the proper means for preventing entities from acting unconstitutionally." *Malesko*, 534 U.S. at 74. Thus, in *Malesko*, the Court noted that the plaintiff inmates had "full access to remedial mechanisms . . . including suits in federal court for injunctive relief." *Id.*

Indeed, the federal employee denied a *Bivens* remedy by *Bush* would have been able to seek equitable relief from the courts. The *Bush* plaintiff was challenging his demotion, *see* 462 U.S. at 370, and thus had recourse to the MSPB, *see* 49 U.S.C. § 40122(g)(3), (j), and the right to judicial review in

[10] *Cf. Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) ("[T]hat Congress did not validly abrogate the States' sovereign immunity from suit by private individuals for money damages under Title I does not mean that persons with disabilities have no federal recourse against discrimination. . . . [The ADA's] standards can be enforced by . . . private individuals in actions for injunctive relief. . . .").

the Federal Circuit, *see* 5 U.S.C. § 7703(a)(1), (b)(1). In describing the available procedures, the Court explained that "[i]f the employee prevailed in the administrative process or upon judicial review, he was entitled to reinstatement with retroactive seniority." *Bush*, 462 U.S. at 388. Thus, the "existing civil service remedies," which the Court found "constitutionally adequate" to vindicate the plaintiff's constitutional rights, specifically included "procedures—administrative and judicial—by which improper action may be redressed." *Id.* at 378 n. 14, 385.

C. The Presumption of Judicial Review, Jettisoned by the Ninth Circuit, Facilitates the Collective-Bargaining Process.

Congress "legislate[s] against a backdrop of judicial review" for equitable constitutional claims, *see Gutierrez de Martinez*, 515 U.S. at 425, and the Court restricts monetary remedies under the assumption that equitable relief remains available, *see Malesko*, 534 U.S. at 74. The careful balance struck by the CBA itself depends on the long-established assumption that judicial review remains available for equitable constitutional claims. So long as access to the courts remains available at the back end to enjoin violations of fundamental constitutional rights, employee unions can grant agencies needed flexibility at the front end, while remaining confident that particularly egregious abuses will be checked. If back end review of even constitutional claims is abolished, however, employee unions will have no choice but to demand greater specificity upfront. Agencies would risk losing—not gaining—the flexibility they desire.

III. THE NINTH CIRCUIT'S DECISION IGNORED THE CSRA's TEXT, PURPOSE, AND STRUCTURE.

Far from providing the "clear statement" stripping the courts of the ability to enjoin unconstitutional agency conduct, the CSRA does the opposite. The text and legislative history of the 1994 amendments to 5 U.S.C. § 7121(a)(1) make clear that the CSRA's exclusivity requirement applies only to administrative procedures.

A. The Plain Text Of The CSRA Amendment Does Not Preclude Judicial Review.

The Ninth Circuit's decision holding that § 7121(a) precludes judicial review flouts several canons of construction. First, the Court "construe[s] a statute to give each word some operative effect." *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 125 S. Ct. 577, 584 (2004). Under the Ninth Circuit's interpretation, however, the word "administrative" has no effect.

Second, the Court gives "undefined [statutory terms]…their ordinary meaning." *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995). Both the Court and leading legal dictionaries distinguish between judicial and administrative functions, and both did so at the time the word "administrative" was inserted. *See, e.g. City of Rancho Palos Verdes v. Abrams*, 125 S. Ct. 1453 (2005); *Black's Law Dictionary* 45 (6th ed. 1990) (defining an "administrative remedy" as "a *nonjudicial* remedy provided by an administrative agency") (emphasis added).

Third, the Court presumes that "equivalent words have equivalent meaning when repeated in the same statute." *Cohen v. de la Cruz*, 523 U.S. 213, 220 (1998). Congress in §§ 7701 and 7703 treats "administrative" review and

"judicial" review as distinct entities. *Compare* 5 U.S.C. § 7701 (providing for administrative review by the MSPB), *with id.* § 7703 (providing for judicial review of MSPB decisions). There is no reason to believe that Congress also intended "administrative" to mean "administrative and judicial," especially given that such a definition would diverge from the ordinary meaning of both terms.

B. The CSRA's Legislative History Reinforces Congress's Intent to Preserve Judicial Review.

The Court does "not lightly conclude that a congressional enactment has no purpose or function." *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555, 560 (1963). As a result, the Court applies the "common-sense presumption" that Congress intends to change a law that it amends. *Wallace v. Jaffree*, 472 U.S. 38, 59 (1985). The legislative history confirms that by inserting "administrative" into § 7121(a), Congress intended to abrogate court decisions holding that CSRA § 7121(a) precluded judicial review.

Testimony by National Treasury Employees Union officials proposed "a change to existing law, as interpreted by the Federal Circuit in *Carter v. Gibbs*, to ensure that the negotiated grievance procedure is the *exclusive administrative procedure*, but does not supplant any remedies which allow Federal employees to be heard directly in Federal court."[11] The Court has paid keen attention to the statements of interested parties, including labor unions, which played a key role in the given statute's enactment. *See, e.g., Chicago & Nw. Ry. Co. v. United Transp. Union*, 402 U.S. 570, 576 (1971) (labor and management

[11] *To Reauthorize the Office of Special Counsel and to Make Amendments to the Whistleblower Protection Act: Hearing on H.R. 2970 Before the House Subcomm. on the Civil Serv. of the House Comm. on Post Office and Civil Serv.*, 103d Cong. 23 (1993) (emphasis added).

representatives receive "great weight in the construction of the [Federal Labor Railway Act]" due to the representatives' role in the Act's enactment).

A companion bill addressing the Federal Employee Fairness Act of 1994 ("FEFA"), which was debated simultaneously with the 1994 amendment to the CSRA, similarly inserted "administrative" into § 7121(a). The House Report for FEFA specifically stated that the proposed amendment

> clarifies Congress' original intent that the grievance procedure would be an exclusive administrative procedure for matters that it covers. The grievance procedure was never intended to deprive employees of access to the courts. This clarification is necessary to correct an erroneous decision of the U.S. Court of Appeals for the Federal Circuit. *Carter v. Gibbs*, 909 F.2d 1452 (Fed. Cir. 1990). *cert. denied sub nom. Carter v. Goldberg*, 498 U.S. 811, 111 S. Ct. 46 (1990), which denied employees the right to judicial review of claims under the Fair Labor Standards Act.

H.R. Rep. No. 103-599, pt. 1, at 56 (1994). Though FEFA was never enacted, Congress considered the two pieces of legislation during the same legislative session. Therefore, FEFA's legislative history is "wholly relevant to an understanding of" a subsequently enacted bill with the same operative language. *United States v. Enmons*, 410 U.S. 396, 405 n.14 (1973).

Unlike the Ninth Circuit, the Federal Circuit scrutinized the CSRA's wording, structure, and history, and concluded that the 1994 amendments to the CSRA preserved judicial

review. *Mudge v. United States* 308 F.3d 1220 (Fed. Cir. 2002). The court rejected the argument that Congress inserted "administrative" into § 7121(a) in order to clarify the statute. In *Carter*, the Federal Circuit interpreted the "unambiguous" pre-1994 version of the statute to mean that the CBA grievance procedures provided the *only* procedures for resolving grievances falling within the statute's coverage. 909 F.2d at 1454. As *Mudge* explains, Congress had no need to clarify an unambiguous statute that had previously been interpreted to preclude judicial review. 308 F.3d at 1228. Instead, Congress's insertion of "administrative" indicates that § 7121(a) limits *only* an employee's administrative remedies, and not her judicial remedies. *See id.*

The Federal Circuit is the Article III court with exclusive jurisdiction to review employment-based money damage claims against the United States, and also reviews MSPB and OSC decisions arising from the CSRA's administrative procedures. Given "the primacy of the United States Court of Appeals for the Federal Circuit for judicial review [under the CSRA]," *United States v. Fausto*, 484 U.S. 439, 449 (1988), *Mudge*'s analysis warrants the Court's attention, and the Ninth Circuit's erroneous interpretation should be rejected.

CONCLUSION

For the foregoing reasons, the judgment should be reversed.

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